U.S. 130, 148 (1982). The application of this doctrine turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government. United States versus Winstar Corp. et al., U.S. , No. 95–865 slip op. at 39 (July 1, 1996).

As opposed to attempts to bind Congress from enacting regulatory measures inconsistent with the contracts, the contracts in Winstar allocate or shift the risks incurred by the parties. The plaintiff Winstar did not assert that the Government could not change the capitalization requirements applicable to the plaintiff, but that the Government assumed the risk that where subsequent changes prevented the plaintiff from performing under the agreement that the Government would be held liable for financial damages. So long as such contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it. Id. at 41.

Under the production flexibility contract, risks are allocated among the parties. As opposed to prior farm programs, the producers agree to accept the risk of fixed payments unrelated to national supply or established target prices in exchange for the Government's acceptance of the risk of less control over supplies of various types of agricultural commodities. As in Winstar, the issue does not turn on whether the Government can subsequently change the rules under which producers operate if they elect to participate in a program, the issue is whether enforcing the risks shifted among the parties will infringe upon the sovereign jurisdiction of the United States. Where changes in the production flexibility contract by the Government result in a financial liability to the producer, the Government is liable to the producer for a breach of contract and damages. This liability does not infringe on the Government's sovereignty and does not violate the unmistakability doctrine.

The Government in Winstar, supra, also asserted that under the sovereign acts doctrine, ''whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.'' The Court in the Winstar case held that the sovereign acts doctrine:

* * * balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law. Id. at 57.

In answering the first question, the Court looked at whether the action by the Government having an impact on the public contract was merely incidental to the accomplishment of a broader governmental objective. The greater the Government's self-interest, the more suspect the claim that the private contractor bear the financial burden of the Government's action. Id. at 60. In Winstar, the Court found that a substantial purpose of the Government's action was to eliminate the very accounting formula that the acquiring thrifts had been promised. Thus, the Government's self-interest was so substantial that the statute was not a ''public and general'' act for purposes of the sovereign acts defense. Id. at 61.

Any changes to the statutory authority for production flexibility contracts would no doubt follow the same analysis as that relied upon by the Court in Winstar. To the extent that the farm programs would be altered, it would be likely that the Government would have substantial self-interest in any relief it might obtain from risks allocated it under the contract. Most likely this would result in some legislative change to reduce the amount of money paid to producers. While such change would likely be for the ''public and general'' benefit, it would undercut the allocation of risks between the parties to the contract and as such, would substantially be in the Government's self-interest.

Finally, the Government in Winstar asserted the defense of impossibility. To invoke the defense of impossibility, the Government would have to show that the nonoccurrence of regulatory amendment was a basic assumption of the contracts. That is the parties assumed that the statute on capitalization requirements would not change. As the Court notes, a change was both foreseeable and likely in that case. Id at 67.

The production flexibility contract states in the appendix to Form CCC–478 (the production flexibility contract) that if the statute on which the contract is based is materially changed during the period of the contract, CCC may require the producer to elect between modifications of the contract consistent with the new provisions and termination of the contract. This statement itself is an acknowledgment that the Congress very well may change the Agriculture Market Transition Act prior to its expiration in 2002. Further, if Congress changes the program, it is reasonable and expected that the contracts would be modified accordingly. However, as was true with the plaintiff in Winstar case, producers have no desire to assert that Congress cannot change the underlying statute, but instead, may pursue a claim for breach of contract and damages where any legislative change results in changes to the contract and producers incur financial damages. The acknowledgement of possible legislative change to the production flexibility contract should only serve to weaken any further Government defense of impossibility.

PROVIDING FOR CONSIDERATION OF CONFERENCE REPORT ON H.R. 3610, DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 1997, AND PASSAGE OF H.R. 4278, OMNIBUS CONSOLIDATED APPROPRIATION ACT, 1997

SPEECH OF

HON. SUSAN MOLINARI

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Ms. MOLINARI. Mr. Speaker, section 120 of the omnibus funding bill, H.R. 3610, contains an amendment to the effective date provision for rules 413 through 415 of the Federal Rules of Evidence. This amendment will overcome the harmful effects of the Tenth Circuit Court of Appeals' restrictive interpretation of the effective date language in United States versus Hollis Earl Roberts.

My explanation of this amendment was printed on page H12104 of the September 28 daily edition of the CONGRESSIONAL RECORD, but with a number of typographic errors. To provide an accurate text, the following corrections are required to the text of my statement as printed on page H12104 of the September 28 daily edition:

In the first paragraph of the statement, in the second sentence, ''supervision'' should be ''suppression''.

In the second paragraph of the statement, in the second sentence, the word ''the'' should not appear before ''other occasions''. Also, in the penultimate sentence of the second paragraph, ''3000'' should be ''300''.

In the third paragraph of the statement, in the first sentence, ''the date'' should be ''that date''. Also, the second sentence in the third paragraph should actually be two sentences reading as follows: ''Some judges have properly interpreted the effective date provision to make the rules apply in all cases in which the relevant proceeding—the trial—commences on or after the effective date of July 10, 1995. Other judges, however, have refused to apply the rules in cases where the indictment was filed before July 10, 1995, even though the case would be tried after that date.''

In the penultimate paragraph of the statement, in the first sentence, ''indicated'' should be ''indicted''.

CONDEMNING THE ATTACK ON THE ECUMENICAL PATRIARCHATE IN ISTANBUL, TURKEY

HON. RICHARD A. GEPHARDT

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Wednesday, October 2, 1996

Mr. GEPHARDT. Mr. Speaker, I rise to condemn the recent attack on the ecumenical patriarchate in Istanbul, Turkey.

On September 30, a hand grenade and machinegun fire were directed at the ecumenical patriarchate in Istanbul. The home of Ecumenical Patriarch Bartholomew, this site serves as the headquarters of Orthodox Christianity for over 300 million worshipers worldwide. The damage from this attack is reported to have been extensive, having blown out windows of the Patriarchal Cathedral of St. George and the sleeping quarters of His All Holiness and others in the compound.

Terrorist attacks such as this should be condemned by all, and must be tolerated by none. The targeting of a religious compound serves as a disturbing reminder of the extent to which the practitioners of terror will go to achieve their aims, and should cause us to redouble our efforts against those who seek gains through destruction and violence against innocent individuals.

I urge the Turkish authorities to investigate and seek justice against the perpetrators of this deplorable act. I extend my support to Patriarch Bartholomew and Orthodox Christians throughout the world as you seek to restore the ecumenical patriarchate and continue to express your faith in peace.